SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

KIRLAN VENTURE CAPITAL, INC. et al., Plaintiffs, vs. REGIS et al., Defendants.	CAUSE NO. 00-2-14333-8 SEA **MEMORANDUM OPINION RELATING TO CR 11 MOTIONS OF REGIS AND TENNESON**

MEMORANDUM OPINION

The issue before the court is whether the plaintiff, Kirlan Venture Capital, Inc. ("KVC") and third party defendants, A. Kirk and Janet Lanterman, husband and wife ("Lanterman")[1], or their counsel, or both, should be sanctioned under the provisions of Rule 11, Superior Court Civil Rules ("CR"). Defendants and third party plaintiffs Daniel Regis ("Regis") and William Tenneson ("Tenneson") and their respective marital communities allege violations of CR 11 by KVC, Lanterman, and their counsel and seek an award of attorneys' fees as a sanction for the alleged violations.

Based on the findings and analysis set forth in this memorandum, the court concludes that certain of the claims asserted by KVC, through Lanterman, and its counsel were without sufficient basis in law or fact. The court further finds that certain other claims, while marginally supportable under the facts and applicable law were nonetheless added to the complaint in this matter for the improper purpose of harassing the individual defendants, Regis and Tenneson.

As a consequence of these findings and conclusions, the court orders Dorsey & Whitney to pay a sanction of $200,000 to Regis and $200,000 to Tenneson. KVC, and Janet and Kirk Lanterman and their marital community, are liable jointly and severally to pay a sanction of $50,000 to Regis and to $50,000 to Tenneson.

Background and Statement of the Case

Statement of Facts

The facts of the underlying litigation are relevant to this motion only with respect to the court's determination of the issue of the "reasonable inquiry" required of any entity making claims against another in litigation and of that entity's legal counsel. The underlying dispute between the parties arose originally as Regis and Tenneson disagreed with Lanterman over the characterization of compensation due each of them for services rendered to KVC.

KVC is a financial management firm wholly owned by Lanterman.[2] KVC acts as general partner in two venture capital limited partnerships[3] and acts as a financial management and investment company for Lanterman personally. Regis served as president of KVC and fund manager for the two venture capital funds from July 1996 to June 1999 and remained as a consultant to KVC under contract from June, 30, 1999, to October 29,

[1] References in this opinion to "Lanterman" shall refer to Mr. Lanterman alone.
[2] Although there was some testimony denying any community property interest in KVC held by the marital community, it was not necessary to resolve that issue at trial. The evidence is undisputed that Kirk Lanterman owns 100% of the shares of KVC.
[3] The Kirlan limited partnerships shall be referred to by the shorthand designation "K-1" and "K-2".

1999.[4] Beginning in July 1999, Tenneson became president of KVC and fund manager of the two funds.

Tenneson began work on a "third fund" as contemplated by his employment agreement. Lanterman communicated that he did not want to participate or invest in the fund proposed by Tenneson in any way. Tenneson ultimately launched the new fund as Digital Partners III, limited partnership ("DP III"). Lanterman fired Tenneson in May 2000, on the eve of commencement of the underlying action.

To the extent any other underlying facts or legal analysis are relevant to this court's inquiry under CR 11, those facts and law will be described in context.

Procedural Posture

In March 2000, Regis sued KVC in this court for, *inter alia,* breach of contract with respect to compensation he claimed KVC owed him. The compensation issues were intimately linked to issues of federal tax characterization. Based upon that link, KVC removed the case to federal court. The federal court stayed proceedings and remanded the matter to this court for determination of the state law contract issues.

On May 18, 2000, KVC and the Lantermans initiated the underlying case against Regis and Tenneson.[5] Regis and Tenneson filed counter claims and third party claims against Lanterman. The original complaint asserted twelve causes of action or claims for relief.[6] Kirlan amended the complaint four times. The fourth amended complaint included 17 causes of action and asserted a right to the remedy of constructive trust.

Regis and Tenneson counterclaimed against KVC and asserted third party claims against Lanterman. The court heard motions for summary judgment by both parties on September 27, 2001, and October 1, 2001. The court made rulings on October 4, and October 9, 2001, dismissing summarily many of the claims asserted by each side. The case went to trial on the few remaining issues. All of the claims, counterclaims, and third party claims asserted in the underlying litigation were resolved by December 2001.

The instant matter came before the court on motions of defendants Regis and Tenneson seeking an award of attorneys' fees and costs relating to this extensive and intense commercial litigation. Defendants asserted that the litigation initiated by Kirlan and the Lantermans was frivolous and that fees and costs should be awarded under

[4] Regis's consulting contract was for a six-month term to end December 31, 1999. On October 29, 1999, Lanterman notified Regis that he was forbidden to act on behalf of, or render any further services to, KVC. KVC paid the consulting contract compensation for the full term, but did not allow Regis to perform any services for that payment after October 29, 1999.

[5] Attached to this opinion, as "Exhibit A", is a chart of the claims made by plaintiffs and defendants/third-party plaintiffs.

[6] In addition to the stated causes of action, the initial complaint sought pre-judgment attachment, injunctive relief, and imposition of a constructive trust. Plaintiff removed the request for imposition of a constructive trust from the first amended complaint, but reintroduced it in the second amended complaint.

WASH. REV. CODE ("RCW") § 4.84.185. Defendants also asserted entitlement to fees and costs as sanctions under CR 11.

The court considered defendants' motions for fees and costs initially without oral argument. The court found that plaintiff's complaint did not initiate a frivolous lawsuit and that an award of fees and costs was not, therefore, appropriate under RCW § 4.84.185. By letter notification to counsel, however, the court asked for evidence relating to eight of the eighteen claims asserted in the fourth amended complaint. The court sought and received evidence regarding the factual and legal investigation of these enumerated claims by counsel. The court also considered the motivation for filing the enumerated claims to determine if any might have been asserted for an improper purpose by counsel or by Lanterman.

Because of scheduling difficulties, the court heard evidence on eight to nine days over an extended period. The court took the matter under advisement. This Memorandum Opinion shall serve as the court's findings of fact and conclusions of law with respect to the CR 11 issues.

Analysis

Civil Rule 11[7]

Case law in Washington interpreting CR 11 is limited and Washington courts may refer and have referred to authorities from other jurisdictions, including federal courts, for guidance. The text of the rule indicates that counsel's signature certifies the validity of court papers. The rule sets out two bases for the legitimacy of pleadings. The rule requires that pleadings be well based in fact and in law (as it exists or as it should be legitimately modified or extended) and that counsel's decision regarding the basis of the pleading be made after reasonable inquiry. Further, counsel's signature is a certification that the pleading is not presented for "any improper purpose." The court,

[7] CR 11(a) provides as follows:

> Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. . . . The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

upon finding a violation of the rule, may impose sanctions upon not just the individual signer of the pleading, but also against the signer's law firm, as the signer is an agent of the law firm.[8]

The cases that analyze CR 11 and its counterparts from outside this jurisdiction generally discuss the thin line between zealous advocacy and sanctionable conduct. CR 11, which requires if not restraint then the generous exercise of reason, must be balanced against the possible chilling effect of the rule on enthusiasm, creativity, and "vigorous advocacy."[9] The rule itself recognizes a need for counsel to assert claims on behalf of their clients, even if those claims require "a good faith argument for extension, modification, or reversal of existing law."

The court is obliged to enforce CR 11 with the same restraint the rule requires of counsel. CR 11 is not meant to provide a procedural mechanism for kicking an opponent who is down. Indeed, dismissal or denial of claims does not necessarily mean that the claimant has asserted ungrounded or improper claims. It is imperative that the court not investigate counsels' filings using "20-20 hindsight."[10]

The focus of the court's review is not whether plaintiffs' counsel interpreted the facts in the same way as the court found them in its ultimate ruling. The court need only determine whether, under an objective standard, counsel made a reasonable inquiry before making assertions in the pleading at issue. The reasonableness of an attorney's inquiry is judged on *(i)* the time available to the signer*, (ii)* the extent of the attorney's reliance on the client's factual assertions, *(iii)* whether the attorney accepted the case from another attorney, *(iv)* the complexity of factual and legal issues, and *(v)* the need for discovery to develop factual circumstances underlying a claim.[11]

Similarly, the court need not make a determination as to the correctness of counsel's legal analysis. The court must only determine whether, using that same objective, competent attorney standard, counsel made a reasonable inquiry into the state of the law. The court must also evaluate whether counsel or their client asserted any of the enumerated claims for an improper purpose.

The court is not to consider CR 11 sanctions if an applicable and appropriate remedy is available by statute or under other rules.[12] Although the rule itself mentions an award of fees and costs (or a portion thereof) as an appropriate sanction, CR 11 is not intended as a fee-shifting mechanism. It is the court's duty to determine an appropriate sanction in cases of violation of the rule.

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[8] *See Madden v. Foley,* 83 Wash. App. 385, 392 (1996).
[9] *See, e.g., Bryant v. Joseph Tree, Inc.,* 119 Wash. 2d 210, 219 (1992) *(citing Townsend v. Holman Consulting Corp.,* 929 F.2d 1358, 1363-64 (9th Cir. 1990).
[10] *See Joseph Tree, 119 Wash. 2d at 220.*
[11] *See Bryant v. Joseph Tree,* 119 Wash. 2d at 220-21.
[12] *See, e.g.,* WASH. REV. CODE ANN. § 4.84.185 *[hereinafter, "RCW"]*; CR 26.

It should also be noted that counsel are not judged harshly for the filing of an initial complaint that is based on the best then-available information, provided counsel can justify the claims after reasonable investigation into the known facts and applicable law or a good faith extension thereof.[13] Parties are permitted liberally to amend their complaints as they uncover facts that both support and undercut their initial claims or that reveal possible additional claims. CR 11 imposes a duty on counsel to evaluate and reassess all claims throughout the litigation.[14]

When one party alleges credibly a violation of CR 11, the court must conduct an evidentiary investigation of the allegation and make a determination separate from any rulings on the underlying claims. Only if the court determines, after inquiry, that claims were asserted without proper grounds (after reasonable investigation), or without a proper purpose, can the court impose sanctions under CR 11. The standard is an objective one. The proverbial "reasonable person" in the case of CR 11 is reasonable attorney in like circumstances[15].

The "Kirlan" Case

The operative pleading

In almost nine court days of testimony relating to the CR 11 issue, counsel for Lanterman, as owner of KVC, and counsel for KVC's attorneys at the firm of Dorsey & Whitney, reviewed in detail each claim the court identified for further inquiry. Plaintiff asserted four of the eight questioned claims in the initial complaint filed in May 2000. In four amendments, plaintiff never modified or deleted any of the original claims. The plaintiff added three of the claims at issue in the first amended complaint filed a month after the initial complaint. The fourth amended complaint, filed two years into the litigation, contained the first assertion of the eighth questioned claim--defamation.

The operative pleading, for purposes of analysis of the CR 11 claims, is the fourth amended complaint. By the time plaintiff filed the fourth amended complaint, all counsel and all parties had had ample opportunity to communicate with their respective clients, to investigate all the facts alleged by their respective clients, to do exhaustive legal research relating to any and all claims that might reasonably be exchanged by the parties, and to communicate with each other concerning their clients' varying perspectives on the factual and legal issues raised in the four preceding iterations of the complaint.[16]

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[13] To require otherwise would be inconsistent with Washington's notice pleading rule. *See Joseph Tree,* 119 Wash.2d at 222.

[14] *See Kale v. Combined Insur. Co.,* 861 F.2d 746, 757 (1st Cir., 1988); *Doe v. Spokane and Inland Emp. Blood Bank,* 55 Wash. App. 106, 114 (1989).

[15] *See Kale,* 861 F.2d *at* 758; *Bryant v. Joseph Tree, Inc.,* 119 Wash.2d at 210.

[16] The underlying litigation revealed quite clearly that the litigants, all powerful and worldly players accustomed to respect and obeisance from others, had reached rapidly a point of mutual intolerance. The disputes involved many millions of dollars. Counsel could not have expected their respective clients' memories and perspectives to change. Each was firmly convinced of his rectitude in the conflict. Each was endowed with pockets bulging with "dot.com" profits. Each appeared to be willing and anxious to

The court has viewed and reviewed voluminous documents and other exhibits that counsel selected for presentation in the context of the CR 11 hearing. The court is also familiar with, and relied upon, to the extent necessary and appropriate, materials submitted for pre-trial and trial consideration. In short, the case was hard fought. As would be any case involving potential loss or gain of significant sums of money, this litigation was very paper-intensive and sophisticated.

Attorney staffing

KVC's counsel, Dorsey & Whitney, is a multi-national law firm of significant size and sophistication. The testimony revealed that the firm operates, as do many large law firms, using teams of lawyers on any representation of substance. The representation of KVC was a sizable representation. Some of the issues presented by the disputes between these parties were legally complex and factually murky. The parties were in and out of federal court and spent a great deal of time in this court narrowing and refining the issues for trial. Some of the issues between the parties were less complex and less murky. In fact, the court disposed of 11 claims on summary judgment.

During the course of Dorsey & Whitney's representation of KVC and Lanterman, the firm employed a large number of attorneys to address specific client needs. Several business and tax attorneys worked with the clients before the matter came to court. Once Regis filed the original complaint, Dorsey & Whitney staffed the matter with attorneys from its litigation group.[17]

During the course of the hearings on the CR 11 motion, the court heard testimony of Mr. Fairchild, Mr. Carlson, and Mr. Clinton, all of whom were listed as attorneys of record and all of whom participated throughout the trial. Mr. Fairchild's testimony was that he drafted what was the essence of the initial complaint. He drafted the pleading originally as a counterclaim in federal court. After some analysis, Mr. Fairchild concluded that there was no supplemental federal jurisdiction for the counterclaims and the pleading was redrafted as the complaint that initiated this litigation.

Mr. Fairchild testified that shortly after Dorsey & Whitney filed the initial complaint, he was out of town involved in other litigation. He asked Mr. Hineline to join the KVC litigation team in his absence. Mr. Hineline reviewed the complaint and drafted the first amended complaint, adding the Lanham Act and state securities laws claims. Mr. Fairchild concluded his out of state litigation and rejoined the KVC litigation team. He remained active in the team from that point forward and signed all of the successive amended complaints.

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fight to the bitter end. Counsel, however, had many opportunities to look at the actual evidence and to discuss the relative merits of each party's legal position. Unfortunately, for all concerned, the record reveals very little substantive, non-combative communication between counsel.

[17] "Exhibit A" includes a list of the attorneys whose names appeared on each of the complaints and a notation of the attorney who actually signed each version.

Mr. Fairchild testified that his method of factual research included a review of all the client documents accumulated at the Dorsey & Whitney offices before he joined the team and review of documents at the KVC offices. Mr. Fairchild also testified that he consulted with Ms. Hunt, the chief financial officer of KVC, with Mr. Lanterman, and with unidentified "potential witnesses."

Mr. Clinton testified that when he joined the litigation team, he read all the pleadings in the case and reviewed the documents assembled at the law firm. Mr. Clinton testified that he interviewed Kirk and Janet Lanterman and Ms. Hunt. With regard to his legal investigation, Mr. Clinton testified that he assessed whether the legal theories "made sense". Mr. Clinton indicated that he wanted only to assert claims he could win. He asserted that his personal standard for pursuing claims in this litigation was not merely to pass the raised-eyebrow test, but to assert claims that would be successful for his clients. In the course of his testimony, Mr. Clinton referred to some legal authorities that he believed supported the asserted claims. He did not testify that he had done any independent legal research before successive amended complaints that bear his name.

Mr. Carlson testified that he likewise reviewed the Dorsey & Whitney file and the clients' documents when he joined the litigation team. Mr. Carlson testified that he reviewed the legal and factual basis for each asserted claim. He also read the deposition of Mr. Regis that was taken in the context of the federal district court litigation and did some independent legal research. During the CR 11 hearing, he cited authorities upon which he relied in pursuing the asserted claims.

The court's inquiry

Several issues remained after all summary judgment considerations. Those issues were preserved for and resolved by trial. After trial, defendants Regis and Tenneson presented the CR 11 issues to the court. The court designated the following issues as worthy of further inquiry: Fifth Cause of Action: Misappropriation of Proprietary Information and Trade Secrets – Regis and Tenneson; Seventh Cause of Action: Intentional Interference with Contractual Relations and Business Expectancies – Regis and Tenneson; Eighth Cause of Action: Violation of Lanham Act – Regis and Tenneson; Ninth Cause of Action: Unfair Business Practices – Regis and Tenneson; Tenth Cause of Action: Common Law Unfair Competition – Regis and Tenneson; Eleventh Cause of Action: Civil Conspiracy – Regis and Tenneson; Thirteenth Cause of Action: Conversion and Destruction of Company Records – Regis and Tenneson; Seventeenth Cause of Action: Defamation – Regis.

Misappropriation of Proprietary Information and Trade Secrets – Regis and Tenneson

The trade secrets claims asserted by KVC were not valid or sustainable claims against either Regis or Tenneson individually. Dorsey & Whitney is liable for sanctions for pursuing those claims. The misappropriation claims were colorable and were not asserted for any improper purpose.

To sustain a claim for damages for misappropriation of proprietary information and trade secrets, the plaintiff must show: 1) that it had property or information that derives independent economic value from being not generally known or ascertainable, and 2) that the plaintiff employed reasonable efforts to maintain its secrecy.[18] A plaintiff cannot claim as a trade secret information it obtained from a third party who is willing to share that information.[19] Trade secret status cannot attach to information that is readily ascertainable.[20]

In this case, KVC claimed that the names of limited partners in K-1 and K-2 were trade secrets, that information relating to the financial performance of K-1 and K-2 was a trade secret, and that "due diligence" information developed by Regis and Tenneson while in the employ of KVC was proprietary information with independent economic value.

Evidence in the case revealed that Lanterman procured or introduced at most three of the nine limited partners in the combined Kirlan Ventures. Regis recruited the remaining limited partners from a circle of acquaintances developed over the years of his professional life. Regis had reason to know these investors and had *entrée* to introduce them to the K-2 partnership. KVC cannot claim anything about the identification of potential investors that is proprietary. Furthermore, as Regis did not take any effort to keep his circle of acquaintances, and the potential investors among them, a secret, KVC cannot claim that that self-same information is a KVC trade secret. The role Regis played in assembling the K-2 investors was or should have been apparent almost immediately upon commencement of discovery in this case. It was not reasonable, based upon readily available factual information, for KVC's counsel to continue to pursue this claim on this basis. Regis's contacts were not trade secrets of KVC and competent counsel should not have made such an assertion.

Furthermore, any reasonably astute financial management professional could assemble a list of names of potential investors in short order by resorting to public information, *e.g.,* business directories, business publications, daily newspapers, national business and money management magazines. One can surmise knowledge of a potential investor's probable net worth from public sources. The propensity of a potentially qualified investor to be interested in a venture capital partnership can be ascertained in a single contact.

The position of both KVC and its counsel was that KVC took reasonable steps to maintain the confidentiality of all financial information relating to KVC and the Kirlan partnerships. Ms. Hunt testified that she kept the KVC and partnership books and that she maintained them in a locked cabinet behind her desk. Neither Lanterman nor KVC has asserted, however, that either Regis or Tenneson exposed or exploited KVC's internal business and financial information.

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[18] *See* RCW 19.108.010(4).
[19] *Precision Moulding & Frame, Inc. v. Simpson Door Co.,* 77 Wash. App. 20, 28 (1995).
[20] *Ed Nowogroski Insur., Inc. v. Rucker,* 137 Wash. 2d 427, 441 (1999).

KVC claimed that information about the funds' performance and internal rates of return was proprietary. KVC makes quarterly written reports of partnership performance to the limited partners of K-1 and K-2. KVC distributes these reports containing information regarding partnership investments, the performance of portfolio companies, and partnership internal rates of return regularly to the limited partners without any confidentiality notice or admonition. The reports are not marked "confidential" and nothing in the reports indicates that they contain proprietary, confidential, or trade secret information. The financial performance of the partnerships was information made known to its partners, any one of whom had the ability and prerogative to disclose it to any third party[21]. KVC did not make any effort to keep that information secret. The partnership performance information is neither proprietary nor a trade secret and no competent attorney should assert otherwise.

KVC further asserted that the due diligence investigation relating to K-2 portfolio companies and start-up companies that were potential investments for K-2 or a third fund had independent economic value. Regis and Tenneson expended effort while employed by KVC to identify and analyze these start up ventures. A reasonable attorney could infer misappropriation of this work product from the nature of the venture capital business and the fact that K-2 was not fully invested. It was both factually and legally reasonable for KVC and counsel to claim the misappropriation of this information inasmuch as neither Regis nor Tenneson left behind any information regarding due diligence inquiries they had made as part of their duties while employed at KVC. These facts are sufficient to raise an issue and bring a claim of misappropriation of proprietary information to trial. Counsel's factual and legal investigation on this point was appropriate and the absence of due diligence files or notes was sufficient to support the claim.

Intentional Interference with Contractual Relations and Business Expectancies – Regis and Tenneson

The claims of intentional interference by Regis and Tenneson, each with the other and with expectancies of KVC, are preposterous claims under the circumstances of this case. Dorsey & Whitney and Lanterman are equally liable for sanctions for pursuit of these claims.

The legal requirements for asserting a claim of intentional interference with a contractual relationship or business expectancy are: 1) the existence of a valid contract or business expectancy, 2) knowledge of that relationship or expectancy by the one alleged to have interfered, 3) an intentional act causing a breach or termination of the relationship, 4) damage, and 5) proof that the interferer did so for an improper purpose or by improper means. KVC asserted that both Regis and Tenneson interfered with its

[21] In fact, the limited partnership agreement for K-2 specifically provides at section 10.1(a) that "[a]ny Partner, or its duly authorized representative, upon paying the cost of collection, duplication and mailing, shall be entitled to a copy of the list of the names and addresses of the Limited Partners, including the Capital Account balance of each of them."

business expectancy, *viz.,* the formation of a third Kirlan venture capital fund. KVC also asserted that Regis and Tenneson each interfered with the other's performance of his employment contract with KVC.

Attorney Fairchild testified that his research turned up the *Kieburtz*[22] and *Alexander*[23] cases as legal support for this claim. The *Alexander* and *Kieburtz* cases stand for the proposition that one cannot solicit a current employer's customers for a future, competing business during employment. The *Kieburtz* case concludes that the business expectancy question raises issues of fact. Issues of fact can be determined by the court summarily if no reasonable minds could differ on the findings.

In this case, KVC asserted that Regis and Tenneson interfered with its business expectancies with respect to unnamed potential future investors in a fund that never came into existence. Both Regis and Tenneson did contact K-2 investors during employment with KVC and both did discuss a new fund or a "third" fund with some or all of those investors.

The unexplored factual allegations might lead a reasonable attorney to assert such a claim in an initial complaint. Lanterman asserted that both Regis and Tenneson interfered with KVC's valid business expectancy to form a new venture capital fund. By the time of a second or third or fourth amended complaint, however, it should have been painfully obvious that Lanterman and Tenneson agreed on little except that they never reached agreement regarding the terms of a third fund. The parties had communicated abominably. Whether their failure to communicate was right or wrong, or inadvertent or purposeful, they nonetheless never connected—never had a meeting of the minds—on formation of the elusive Kirlan third fund.

By December 23, 1999, Lanterman had written clearly and emphatically to Tenneson that neither he nor KVC wanted any part in the fund Tenneson was proposing. He did not want to advise, he did not want to invest, and he did not want Tenneson to solicit participation by any Kirlan fund investors. Lanterman demanded that Tenneson remove mention of KVC and himself from the proposed Private Placement Memorandum. Lanterman later permitted Tenneson to contact the K-1 limited partner to discuss investment in the new fund. Lanterman claimed, in hindsight, that he had no knowledge of what Tenneson was working on. No reasonably competent attorney could believe that his client, the chief executive officer and chairman of the board of a national cruise line and the titular head of an investment company that could generate hundreds of millions of dollars in returns was so much in the dark about the activities and business proposals one of his corporation's key employees.

Lanterman would have his counsel believe, and his counsel would have this court believe, that contemporaneous with all the communications regarding a third fund or funds, Lanterman never inquired of Tenneson why he was working on a fund that was

[22] *Kiebertz & Assocs v. Rehn,* 68 Wash. App. 260 (1992).
[23] *Alexander & Alexander Benefits Serv. v. Benefit Brokers & Consultants, Inc.,* 756 F.Supp. 1408 (D. Ore. 1991).

not what he expected or desired. It does not stand to reason that Lanterman never called Tenneson to task for failing to produce the "new fund" Lanterman had in mind, when that was one of the express purposes of his employment.

The legal grounds for these claims are not supportable. Neither KVC nor Lanterman had any contract or business expectancies that every investor in K-1 or K-2 was bound to invest in a K-3. There was no evidence that any act by Regis or Tenneson precluded any K-1 or K-2 partner from a continuing business relationship with KVC in any new venture.

No reasonable attorney would pursue this claim on this basis. It was clear from his testimony, however, that notwithstanding his professed leadership of KVC and his control over that entity, Lanterman did not and would not accept the facts as they appeared. He failed to supervise or manage Tenneson's activities and he refused to direct Tenneson to reconstruct the third fund to conform to his expectations. Ultimately, he adamantly refused to have anything to do with the fund.

Even if Lanterman insisted on asserting this claim, it is incumbent upon counsel to advise clients of the validity of claims and of the consequences of asserting claims for an improper purpose. Whether KVC pursued this claim because of Lanterman or on the advice of counsel, they share responsibility for asserting this claim that had no basis in fact. Dorsey & Whitney and their clients share equally in the responsibility for pursuing this claim and should share equally in the court's sanction for pursuing it.

Similarly, the facts cannot and could not support claims that Regis and Tenneson interfered with each other's employment contracts with KVC. While it might have been reasonable to assert such claims in a first complaint, it was not reasonable to leave them in the operative pleading as the case progressed. Regis was under a consulting contract. Neither Lanterman nor his counsel can characterize his efforts to fulfill his obligations to assist with Tenneson's transition to the president/fund manager position as inducement to Tenneson to breach his employment contract. Regis introduced Tenneson to the investors and to the boards of the portfolio companies on whose boards he was to serve. Regis ceased working for KVC when Lanterman demanded he do so. Similarly, Dorsey & Whitney could point neither to factual information nor to any investigative effort that could produce factual information supporting an assertion that Tenneson did anything to induce breach of contract by Regis.

These claims of intentional interference with contractual relations and business expectancies were not well grounded in fact. Counsel's investigation of the facts alleged by Lanterman to support such a claim was not reasonable or competent. This claim appears to have been made to add weight and bulk to the complaint.

Violation of Lanham Act – Regis and Tenneson

Unfair Business Practices – Regis and Tenneson

Common Law Unfair Competition – Regis and Tenneson

These claims are not supported or supportable. The Lanham Act claims were not factually sound claims. The Consumer Protection Act claims were not legally sound. The Unfair Competition claims were marginal at best. It was clear from the testimony that these claims were not evaluated or asserted individually. The claims were pled, researched, presented, and argued as a "package deal." The packaging suggests that the claims were add-ons to make weight in the complaint and not for valid reasons of redress of perceived wrongs. Dorsey & Whitney is liable for sanctions for pursuing this "constellation" of claims.

Mr. Hineline added these three claims to the complaint in Mr. Fairchild's absence. Attorney Carlson testified that the three foregoing claims amount to a "passing off" claim against Regis and Tenneson.[24] His testimony was that attorneys generally allege these three claims together as a matter of course. He referred to them as a "common constellation of claims." The legal profession demands more of counsel than a because-it-has-always-been-done-that-way analysis.

The legal basis of the Lanham Act claim was an allegation that Regis and Tenneson violated section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), by engaging in a deceptive practice. To succeed on a Lanham Act reverse passing off claim, the claimant must establish that *(i)* the work at issue originated with the claimant, *(ii)* the defending party falsely designated the origin of the work, *(iii)* the false designation was likely to cause consumer confusion, and *(iv)* the claimant was harmed by the defending party's false designation.[25]

Carlson concluded that actual confusion of the public need not be proved, because the references to Kirlan funds and KVC could be presumed to be a "deliberately deceptive commercial practice." Regis and Tenneson contended that the claimant must show actual confusion in the investing public. It was unnecessary for the court to resolve this issue, as the court dismissed the Lanham Act claim on other bases.

The context of the representations challenged by KVC and Lanterman was a private placement memorandum ("PPM") distributed on a very limited basis to sophisticated and knowledgeable investors. The initial PPM identified Regis and Tenneson's affiliation with KVC and the Kirlan funds by name. After Lanterman insisted that the references be redacted, Regis and Tenneson simply claimed their own work history and

[24] Counsel for KVC were, in fact, apparently asserting a claim for "reverse passing off." Section 43(a)(1)(A) of the Lanham Act "forbids not only 'passing off,' in which A promotes A's products under B's name, but also 'reverse passing off,' in which A promotes B's products under A's name." *Carrel v. The Shubert Org., Inc.,* 104 F.Supp.2d 236, 259 (S.D.N.Y. 2000).
[25] *Id.*

experience without naming the employer. Lanterman had the right to remove KVC from participation in the Digital Partners endeavor; he did not have the ability or right to re-write the employment history or accomplishments of its former employees.

Further, the representations that Regis and Tenneson had managed a wildly successful investment fund (K-2) were truthful. Lanterman argued that he made the ultimate investment decisions for K-1 and K-2. No one proffered any evidence, however, to contradict the testimony of Regis and Tenneson that Lanterman was not involved to any degree in the identification of prospective investments, the due diligence on those start-up companies, the ongoing management of the companies as a board member or officer, or the nurturance of the start-ups to bring them to the market. Contrarily, Lanterman reviewed the work product of Regis or Tenneson and approved the recommended investment.

Mr. Carlson testified that he advised Mr. Clinton that the Lanham Act claim was a good claim. Mr. Clinton testified that he relied on the *Riggs*[26] case. The *Riggs* case is a false advertising case in which the court found misleading advertising had been disseminated to hundreds of third parties. The court also made an express finding of bad faith on the part of the defendant in that case. The facts in this case do not approach the facts in the *Riggs* case. It was unreasonable for counsel to analogize the two cases.

For the Unfair Business Practice/Consumer Protection Act claim, KVC claimed the "public interest impact" requirement was satisfied in this case because Regis and Tenneson used false or misleading information on more than one occasion to solicit investors in the new fund. Regis and Tenneson did solicit investors. Lanterman acknowledged that soliciting investors for a new fund was one of Tenneson's primary duties at KVC. In December 1999, Lanterman pulled himself and KVC out of the enterprise. Tenneson changed the PPM to reflect that change and proceeded with his planned fund.

As for the tort claim of common law unfair competition, attorney Carlson testified that this was, again, a "passing off" claim. He asserted that counsels' investigation led them to conclude that Regis and Tenneson had appropriated a competitor's name so as to deceive the public. At Lanterman's demand, Tenneson removed references to KVC and K-1 and K-2 in the PPM historical information. None of the parties who received the initial PPM was confused. The investors or potential investors who received information about DP III before the editing testified consistently at their depositions that they were not confused or concerned about the references to KVC, Kirlan, or Lanterman. All of the investors questioned in discovery stated quite unequivocally that they considered investing in DP III because of a personal or business relationship with either Regis or Tenneson.[27]

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[26] *Riggs Investment Management Corp. v. Columbia Partners, L.L.C.,* 966 F.Supp. 1250 (D.D.C. 1997).

[27] It should be noted that the deposition testimony of these potential investors was recorded *after* the date of the Fourth Amended Complaint. Clearly, counsel for KVC had not done a thorough factual investigation before asserting this "constellation of claims."

Lanterman's allegation of damage resulting from the representations made by Regis and Tenneson in the PPM was not supported by any credible evidence. At no time during discovery in the case or at trial did KVC adduce any evidence that it had suffered damage or injury because of Tenneson's formation of the Digital Partners fund. After Lanterman fired both Regis and Tenneson, he took over management of the Kirlan funds. Lanterman never pursued a third Kirlan fund, so it was not credible for him to say the existence of DP III was in any way damaging or harmful to KVC or to K-1 or K-2, both of which were, by that time, fully invested. He did not employ a fund manager or replace Regis or Tenneson in an effort to launch a new venture capital fund. Lanterman and KVC made no effort to show how, and to what extent KVC had been damaged by the existence of the new fund.

In submissions and in testimony, the Dorsey & Whitney attorneys asserted that the receipt of some mail addressed to DP III at the Kirlan offices and a voicemail message left for Tenneson on the KVC telephone number were evidence of the confusion of the public brought about by the unfair competition of Regis and Tenneson. It is undisputed that Tenneson used the KVC office and telephone for DP III development work. Initially, he anticipated the fund would be a Kirlan fund. It was not until Lanterman declined unequivocally (after several overtures from Tenneson) that Tenneson and DP III established a separate base of operations. Lanterman inquired about an allocation of expenses, signaling he was aware that Tenneson had been working on this fund in the KVC office while employed by KVC.[28] A few pieces of misdirected mail and two or three voicemail messages asking how to reach Mr. Tenneson cannot be extrapolated to public confusion. It was not reasonable or responsible for counsel to rely on that evidence to support this claim.

Civil Conspiracy – Regis and Tenneson

The court's inquiry confirmed that there was insufficient legal support for assertion of these claims. Further counsel conducted insufficient factual investigation before asserting these claims. Dorsey & Whitney is liable for sanctions for pursuing these claims.

Under the *Sterling Business Forms, Inc. v. Thorpe*[29] case, to sustain a claim of civil conspiracy the claimant must show that two or more entities agreed to engage in an enterprise, not in itself unlawful, by unlawful means. The plaintiff bears the burden of proof by clear, cogent, and convincing evidence.[30] Mr. Clinton testified that he relied on the *Sterling Business Forms* case in going forward with the civil conspiracy claim.

[28] KVC made much of the "handsome" salaries paid to Regis and Tenneson while they were at KVC. In an absolute sense, their salaries certainly qualify as "handsome." No one has asserted, however, or can assert that their handsome salaries were out of line for the work each performed as president of KVC and fund manager of K-1 and K-2. These are positions of significant responsibility and trust involving management of large sums of other people's money. The salaries were not out of line with the jobs, even if neither party did anything beyond fund management.

[29] 82 Wash. App. 446, 451 (1996).
[30] *Id.* at 450.

KVC asserted that Regis and Tenneson aided and abetted one another in a conspiracy to damage KVC. Mr. Fairchild testified that the element of illegal or improper means was sufficiently established by the fact that the court did not dismiss plaintiffs' claim of common law unfair competition. Mr. Fairchild's conclusion is not well taken. The court's failure to dismiss that claim on summary judgment does not necessarily mean that a civil conspiracy claim follows on firm ground. Counsel must analyze each claim and determine whether facts and law support the claim.

Tenneson worked with counsel at Perkins Coie to draft the proposed Private Placement Memorandum for the new fund between late summer and the end of the year. During this timeframe, Tenneson continued to solicit Lanterman's participation. Lanterman repeatedly told Tenneson that he wanted no involvement in the fund Tenneson was proposing. Regis left the employ of and any involvement in KVC in October 1999. Regis did not assume a role in Digital Partners until January 2000. By January 2000, Lanterman had reviewed and Tenneson had had Perkins Coie lawyers edit the PPM for the Digital Partners fund. The timeline alone undercuts a claim of civil conspiracy.

Conversion and Destruction of Company Records – Regis and Tenneson

Lanterman and Dorsey & Whtiney ignored the factual evidence relating to this claim as asserted against Regis. Lanterman and Dorsey & Whitney are liable for sanctions for pursuing the claim. The claim as asserted against Tenneson was a colorable claim.

Mr. Fairchild testified that he relied on Ms. Hunt's supposition that KVC records were stolen to support the claim for conversion or destruction of company records. Ms. Hunt did not identify any specific records, though she supposed Regis and Tenneson must have kept "due diligence" files on prospective portfolio companies, none of which she found after their respective departures from KVC. Mr. Fairchild surmised that neither Regis nor Tenneson would have kept due diligence "in their heads." He also asserted that Regis and Tenneson "would have used" that information in the development of their new venture capital firm.

Mr. Clinton testified at the CR 11 hearing that he relied on the *Nowogorski* case as the basis for asserting conversion of company records. The *Noworgorski* case is a trade secrets case, and does not provide any support for a claim of conversion based on the facts asserted in relation to this claim.

Mr. Regis testified at trial and in deposition that he used a laptop computer at KVC, which he routinely "backed up" on the desktop computer. KVC never uncovered or presented a scintilla of evidence that his assertions on this point were not true. Mr. Fairchild asserted that his legal research supported a conclusion that even use of the property of another is sufficient to support a claim of conversion. Yet, the evidence was not clear, cogent, or convincing that Regis used any KVC property after the termination of his consulting contract. As the early factual research should have shown, Regis introduced a substantial majority of the limited partners K-2. Regis did not need

information on a laptop computer to know who his long-term friends and business associates were or what their investment capabilities might be.

At the time he left KVC, Regis arranged to rent the laptop computer he had been using while employed there. He continued to use that computer exclusively for his own purposes after he left KVC. KVC had a legal ownership interest in the laptop hardware, but it had no interest, legal, equitable, or economic, in the contents of Regis's work product stored on that computer after October 29,1999. In December 1999, KVC offered to sell the laptop to Regis, but he declined. He "deleted" the personal files he had stored and any KVC files that had remained resident on the laptop hard drive on the laptop and returned it to KVC.

Throughout the underlying litigation and the CR 11 hearing, KVC's counsel continually referred to Regis "purging" the laptop hard drive. Regis used that laptop for his personal business unrelated to KVC for three months. It was reasonable and astute of Regis to delete his personal items from the laptop before turning it in to KVC, particularly as he left his KVC work as backup files when he left the employ of KVC.

After commencement of this litigation, KVC employed forensic electronic evidence experts to reconstruct the contents of the Regis laptop. The forensic examination did not result in any additional evidence. The deletion of personal files was not a destruction or conversion of any KVC records and the repetition of the "purge" charge did not make it any more true. After the date of their forensic expert's recovery efforts, it was unreasonable for KVC, Lanterman, or Dorsey & Whitney to attempt to make a case for conversion or destruction of company records against Regis. Dorsey & Whitney should have amended the complaint to delete this claim against Regis.

With regard to the conversion alleged against Tenneson, Mr. Fairchild again relied on Ms. Hunt's assertion that she found no due diligence files relating to any investigations Tenneson might have done. Tenneson testified that he did, indeed, have some due diligence files for companies that did not fit the investment guidelines for K-2. As KVC and Lanterman rejected any participation in any new fund that might have invested in those start-up companies, Tenneson took the files with him when he left. The records were produced while Tenneson was employed by KVC and related directly to his tasks there. The claim of conversion of company records as to Tenneson was supportable in fact and law and does not appear to have been made for any improper purpose.

Defamation – Regis and Tenneson

This claim was added to the complaint in May 2001 on the basis of events occurring between October 1999 and October 2000. Testimony and discovery implied that these claims were promoted by Janet Lanterman. Counsel engaged in insufficient investigation. This claim was based in inference. It was apparently added to harass Regis and Tenneson and add to their litigation costs. Dorsey & Whitney and the Lantermans are equally liable for sanctions for pursuing this claim.

To make a claim of defamation, KVC or Lanterman would have to establish a false statement, an unprivileged communication, and injury. A claim is *per se* defamatory if it is likely to injure the subject in his or its trade or business. Plaintiffs asserted three incidents to support their claim of defamation: two published articles and a fax transmission of a letter from Regis to Lanterman aboard a cruise ship.

KVC produced as evidence copies of two articles. The first, authored by Alissa Leibowitz (now Schmelkin) appeared in the *VC Journal* in April 2000. The Leibowitz article erroneously linked KVC to the new Digital Partners funds and alleged that Lanterman had retired or was retiring from active involvement in KVC. The second was an article authored by Chris Winters and published in the *Eastside Journal* and its counterpart, *EJOnline.*, in October 2000.

The *Eastside Journal* article, which quoted Tenneson, contained neither misstatement nor innuendo about KVC or Lanterman. The article reported the differences between DP III and the KVC funds: "The difference this time is not just size. . . *but in its origins."*[31] The article further stated that Regis and Tenneson (and Dr. Gaspers) "*decided to go it alone* and . . . formed Digital Partners in January."[32] At the time of the CR11 hearing, Dorsey & Whitney did not mention this article or its role in their decision to proceed with the defamation claim.

In a declaration dated August 21, 2001, three months after filing the Fourth Amended Complaint, Chris Winters confirmed that had interviewed and quoted Tenneson in the article. Mr. Winters declared that he believed his quotes and the information reported to be accurate. As the article contained almost no information about KVC or Lanterman, except the fact that the two were connected, this declaration provides no support for Dorsey & Whitney's decision to proceed with a defamation claim based on this article. No competent attorney would rely on this article as a basis for such a claim and Dorsey & Whitney's reliance on the article, without more, was irresponsible.

The article authored by Ms. Leibowitz did contain inaccurate and misleading statements. Most notably, the article reported "Kirlan funds will now fall under the Digital name and be managed by Tenneson and Regis."[33]

Dorsey & Whitney deposed Ms. Schmelkin on August 20, 2001, three months after they filed the fourth amended complaint. At her deposition, Ms. Schmelkin refused to answer most questions citing her rights under the New York Reporters or Journalists Shield Law. Ms. Schmelkin did testify that before she wrote the article she met with Regis and Tenneson together once and spoke with Tenneson by telephone. Ms. Schmelkin testified that she believed the contents of the article to be "consistent with what Mr. Regis and Mr. Tenneson told me." Ms. Schmelkin also indicated that Janet Lanterman

[31] Winters, "*Follow the Money: Industry vets lead Digital Partners,"* EJONLINE (www.eastsidejournal.com, October 10, 2000)*(emphasis added).*
[32] *Id. (emphasis added).*
[33] Leibowitz, "Funds: Digital Spins Out, Raises IT Vehicle," VENTURE CAPITAL JOURNAL (April 1, 2000).

and then Ms. Lanterman's attorney had called her in May 2001, but that she refused to talk to either of them.

In his testimony, Mr. Fairchild said the contents of the Leibowitz article were false and misleading, that the article was published and available to participants in the venture capital industry, and that it was damaging to KVC and Lanterman. At no time did any Dorsey & Whitney witness indicate what, if any, factual investigation he did before asserting that this article was an act of defamation by either Regis or Tenneson. Rather, he and his colleagues testified that they could infer that the false information came from Regis and Tenneson. While an inference might support an initial complaint, it is insufficient to support a claim originally made two years after commencement of the litigation. The law firm's factual investigation of this basis for the defamation claim was insufficient and the claim against Regis and Tenneson was not well grounded in fact.

The final item upon which Dorsey & Whitney relied for the defamation claim against Regis was a letter from Regis to Lanterman. Regis faxed the letter to Lanterman aboard the cruise ship Rotterdam on October 22, 1999. The fax transmission consisted of a cover page, a two-page letter from Regis, and four pages of attachments. Each page was stamped "Confidential" in the lower right-hand corner. The letter described Regis's disagreement with Lanterman's prior decision to characterize as salary the payment of Regis's portion of carried interest due K-2. As the carried interest amounted to millions of dollars, the tax ramifications were significant.

Dorsey & Whitney focused on one word in the two-page letter: "windfall".[34] Dorsey & Whitney insisted that this material was defamatory to Lanterman and that Regis damaged Lanterman's business reputation by sending the correspondence to the cruise ship.

At the CR 11 hearing, both of the Lantermans testified that Holland America cruise line has a mail/fax processing protocol that involves several employees aboard the ship. Mr. Lanterman's testimony was that the radio room receives incoming mail and takes it to the captain, who sends it to the hotel manager for delivery by the steward to the passenger-addressee. Mr. Lanterman was particularly "angry" that the letter allegedly accused KVC of taking unauthorized money from the K-2 partnership. The letter does call attention to the fact that the costs of formation of the partnership were less than the amount budgeted and paid to KVC for that expense. In context, this reference does not rise to the level of an accusation of theft. When questioned about damage the letter did to himself or KVC, Lanterman testified that it was "unfair" and that it alleged theft from the partnership. This sentiment does not meet the requirement for a showing of damage to either Lanterman or KVC in its business or property.

[34] The reference on the first page of the letter referred to voiding "the 'windfall' tax benefit to the GP." There is not mention of either KVC or Lanterman as the "GP". On the second page, the full sentence read: "If you persist despite the wishes of your partners, I do have a backup position which I am confident will prevent you from obtaining the 'windfall' deduction."

Neither Lanterman nor anyone else testified that *1)* Regis had any knowledge of the mail handling protocol, *2)* Holland America employees are allowed or encouraged to read the contents of passenger mail marked "confidential", or *3)* that any employee read, cared about, or drew any conclusions from the contents of the Regis letter. Ms. Lanterman testified that two people "mentioned" the correspondence, namely the Chief Radio Officer and the Hotel Manager. She did *not* testify as to how or in what context they "mentioned" the letter. She did *not* testify that anyone aboard the Rotterdam had any knowledge of the contents of the letter or its import.

There was an insufficient factual basis to assert the defamation claim. It was apparently added, late in the litigation, to harass the defendants. No competent attorney, based upon this evidence alone, should proceed with a claim of defamation.

Dictum

Those who are privileged to serve at the bar must, from time to time, be reminded that they are licensed as attorneys *and counselors at law.* It is not sufficient to search for a way to do the bidding of an influential client. It is unprofessional to accept at face value the emotional claims of one who, as in this case, is powerful, unaccustomed to being questioned, and who feels he has been wronged. It is incumbent upon an attorney and counselor at law to develop, maintain, and impart a necessary emotional distance from the client's personal situation. Attorneys must be prepared to conduct an educated and enlightened analysis and to say "no" to their clients when the circumstances so dictate.

Citizens untrained in the law seek out legal counsel to assert or protect their legal rights. Attorneys are not gladiators engaged for purposes of single warrior combat. Attorneys who believe they are in "the business" to do their clients' bidding are in the wrong business. The practice of law is a profession—an honored and honorable profession. Pursuit of the profession demands independence of thought and judgment, even when the expression of that judgment is bad for "business".

The Rules of Professional Conduct require zealous representation of a client's interests. But that representation must be tempered with the training, experience, and discipline of the profession. It must recognize that a client's desires may not always be consistent with either the client's rights or interests.

The testimony of the Dorsey & Whitney attorneys highlights the need for careful training and exquisite oversight of any major litigation in which the representation is undertaken by a team of attorneys. No matter what the resources of the client, no attorney can or should accept a document as handed over without critical inquiry into the bases for the averments and allegations it contains. If the representation is not divided into discrete areas of responsibility, then every attorney touching the case must be assured that every part is well and firmly based in law and in fact. The manager of the representation must be assured, by personal effort, that the entire package is correct, supportable, and coherent.

Team representation is necessary and advisable in many instances, but uncritical "piling on" by members of the team is unseemly and dangerous. Successive complaints may, in any case, add claims as discovery unfolds. But the litigation manager must evaluate the complaint as a whole with each reiteration to be sure that discovery is bolstering *every* claim, not just sparking ideas for new theories. Any claim that is not fully developed in intensive discovery by the time of the fifth iteration of a complaint, as in this case, is not likely to become defensible, either on the merits, or in defense of a CR11 challenge after the fact.

Conclusion

The court's analysis of these claims is based not on hindsight, but upon review of thousands of pages of discovery, pleadings, notes, and upon the testimony of plaintiff's counsel themselves. The court determines that, in whole or in part, each of the eight claims upon which it conducted inquiry were either unsupported by reasonable inquiry into fact or law or were asserted for improper purposes. Dorsey & Whitney essentially used each amendment of the complaint to "bulk up" the allegations and claims rather than to refine them based on the progress of discovery.

The court is ascribing a small portion of the CR 11 liability to KVC and the Lantermans personally. Lanterman sought legal advice and counsel for KVC and himself. There can be no question that Lanterman probably had very firm and fixed ideas about the result he wanted to achieve and the pain he wanted to inflict in the process. Rather than advice and counsel, Dorsey & Whitney provided accommodation. For that failure of professionalism, the firm must pay a disproportionate share of the sanction.

The court is not choosing to award attorneys' fees or costs as a sanction in this matter. Some fees have been awarded previously. The court wishes to avert further protracted litigation over allocation of fees and costs to the selected causes of action. An award of fees is only one form of possible sanction the court may impose under CR 11. In this case, the court chooses to impose a monetary sanction without reference to fees or costs incurred.

Counsel for Regis and Tenneson shall submit, on notice, orders and judgments consistent with the terms of this opinion within 30 days of the date it is signed.

Dated this _____ day of October, 2003.

_____
Suzanne M. Barnett, Judge